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1983

# Gayle L. Martin v. Board of Review of The Industrial Commission of Utah, Department of Employment Security, And National Semi- Conductor Corporation : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANKLIN L. SLAUGH,

Plaintiff/Appellant,

Case No. 19363

THE INDUSTRIAL COMMISSION OF  
UTAH, DEPARTMENT OF EMPLOYMENT  
SECURITY,

Defendant/Respondent.

BRIEF OF APPELLANT

APPEAL FROM THE DECISION OF THE BOARD  
OF REVIEW OF THE INDUSTRIAL COMMISSION OF  
UTAH DATED JULY 27, 1983

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FILED

SEP 26 1983

State Supreme Court Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff/Respondent,	*	
	*	
Defendant/Appellant,	*	
	*	
	*	Case No. 19363
	*	
THE INDUSTRIAL COMMISSION OF	*	
STATE OF UTAH DEPARTMENT OF EMPLOYMENT	*	
SECURITY	*	
	*	
Defendant/Respondent.	*	
	*	
	*	

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BRIEF OF APPELLANT

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APPEAL FROM THE DECISION OF THE BOARD  
OF REVIEW OF THE INDUSTRIAL COMMISSION OF  
UTAH DATED JULY 27, 1983

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

Plaintiff,

vs. the Appellant,

Case No. 19363

BY INDUSTRIAL COMMISSION OF  
DEPARTMENT OF EMPLOYMENT

Defendant.

Appellant Independent.

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is a review of a decision of the Board of Review of the Industrial Commission finding that Appellant was discharged from her employment for acts which were deliberate, willful and wanton and adverse to her employer's financial interests in accordance with §35-4-5(b) (1), Utah Code Annotated (1953 edition).

DISPOSITIONS BELOW

Plaintiff Gavig L. Martin's March 14th, 1983 claim for unemployment benefits was effective March 20th, 1983 by a Department of Employment representative who stated that the Plaintiff had been discharged from employment for not disqualifying reasons. The employer, National Semi-conductor, appealed that award on April 11th, 1983, and a hearing was held in the Appeal Section of the Department of Employment Security on May 10th, 1983. On May 10th, 1983, the appeals referee rendered a decision and recommendation that the Plaintiff was properly discharged from her employment for deliberate acts or omissions in connection with her employment

which were adverse to the employer's interest, pursuant to 23-4-363, Utah Code Annotated (1953, as amended).

The Plaintiff timely filed an appeal from the decision of the appeals referee and on July 27th, 1983, the Board of Review rendered a split decision affirming the decision of the appeals referee denying benefits to the claimant effective March 20th, 1983, and adopting the findings of fact and conclusions of law of the appeals referee.

#### RELIEF SOUGHT ON APPEAL

The Plaintiff by this appeal seeks a reversal of the defendant's decision that the plaintiff acted in a manner which was deliberate, willful and wanton and adverse to her employer's rightful interests and asks that the court enter its judgment that defendant's decision was erroneous as a matter of law and not supported by substantial evidence and that Plaintiff is entitled to unemployment compensation benefits from March 20th, 1983, until she is no longer otherwise eligible, and that therefore as a matter of law unemployment compensation benefits received for the calendar weeks ending April 2nd, April 9th, April 16th, April 23rd, April 29th, 1983, were not overpayments.

#### STATEMENT OF FACTS

The following facts are undisputed. Additional facts will be set forth in the text of the argument.

The Plaintiff, Gayle Martin, was an employee of National Semiconductor Corporation from April of 1979 to March 22nd, 1983. (R.39) At the time of termination the Plaintiff was a line specialist. (R.45,50) The Plaintiff was discharged by National Semiconductor Corporation because of a problem related to mis-processing of material and improper verification of work that had been done by other personnel. (R.40) The employer's representative, Mr. Robert Taylor, testified at the hearing that he had no first hand knowledge of what happened in this case. (R.40) The records of the employer, however, show

that the Plaintiff had received a verbal warning on September 29th, 1982, for a mis-processed lot. The Plaintiff received another verbal warning on January 14th, 1983, for two mis-verified processes. A written warning was issued on February 24th, 1983 regarding a mis-processed lot and, on March 21st, 1983, when another mis-process occurred, the Plaintiff was placed on suspension pending termination and was subsequently discharged. (R.43,44)

After her discharge, Mrs. Martin, applied for and was awarded unemployment insurance compensation benefits by the Department of Employment Security. (R.12) The employer appealed the award.(R.57) The appeals referee reversed the decision of the Department representative (R.12-13) afterwhich the Claimant appeared to the State Industrial Commission Board of Review. (R.30-31) The three member Board of Review affirmed the appeals referee's decision with one member dissenting. (R.10-11)

#### ARGUMENT

##### POINT I.

MRS. MARTIN WAS NOT DISCHARGED FOR AN ACT OR  
OMISSION IN CONNECTION WITH HER EMPLOYMENT  
WHICH WAS DELIBERATE, WILLFUL, OR WANTON AND  
ADVERSE TO HER EMPLOYER'S RIGHTFUL INTEREST

In 1979, section 35-4-5 Utah Code Annotated, a section which set forth criteria of ineligibility for benefits under the Unemployment Compensation Act, was amended to provide:

An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

Discharge for mis-conduct.

(b)(1) For the week in which the claimant was discharged for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful or wanton and adverse to the employer's rightful interest, if so found by the Commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant weekly benefit amount in benafide covered employment.



This statute was recently interpreted in Harbison v. Continental Oil Company, 505 P.2d 727, 730 (Utah, 1973). That court held that the discharge of a police officer for an "incompetent or justified denial of benefits." The court stated in that case that:

Here, the 1979 amendment to § 35-4-1(b)(1) makes no reference to an 'intent to cause harm' or 'the intentional character for misconduct that was 'deliberate, willful, or wanton'. In this case the two acts of misconduct (excess and deceiving the employer) were both 'deliberate' and 'willful' in the sense that they were volitional acts by an employee who should not have been heedless of their consequences. It only remains to determine whether these acts were sufficiently serious to involve the degree of culpability that the department concluded (reasonably, in our view) was impliedly required by this statute. Id. at 444.

The court distinguished deliberate acts of misconduct from "inefficiency or failure of performance as a result inability, inadvertence, ordinary negligence, or good faith error." Id. at 444, n.3. See also, Continental Oil Company v. Board of Review, 505 P.2d 727, 730 (Utah, 1973).

4. The Plaintiff's Inability to Perform Her Job or Her Negligence in Performing Her Job Did Not Constitute Misconduct Within the Meaning of the Law.

Substandard performance by an employee due to inability or inattentance is not misconduct unless it is the result of a deliberate exercise of will contrary to the interest of the employer. Harbison v. Continental Oil Company, 505 P.2d 727, 730 (Utah, 1973). Division, 33 Or.App. 547, 577 and 59 (1978); Continental Oil Company v. Board of Review, supra. The courts dealing with this issue place the emphasis on intentional or negligent conduct, i.e., whether the employee acted in a way his conduct might result in dismissal. Id. supra; Harbison v. Continental Oil Company, 505 P.2d 727, 730 (Utah, 1973).

An early case stated that "the employee must be shown to have acted in a way which would result in dismissal." Boyd v. City of Seattle, 137 W.2d 244, 246 (Wash., 1944). The court stated:

...the intended meaning of the term 'misconduct'...is  
conducted in conduct evincing such willful or wanton disregard  
of standards of behavior which the employer has the right  
to expect of his employee, or in carelessness or negligence  
of such degree or recurrence as to manifest equal culpability,  
wrongful intent or evil design....296 N.W. at 640.

The record below does not contain a single instance of "misconduct"  
and the term has been interpreted by this Court and other courts interpreting  
similar statutes.

In the instant case, the Employer's representative testified at the  
hearing before the appeals referee of the Industrial Commission that the reason  
for the claimant's discharge was "a job performance problem having to do with  
mis-process of material and if I remember correctly, it was a situation involving  
mis-verifying-improperly verifying work that's been done by previous personnel"  
(R.40). Mr. Taylor went on to explain that "processing Semi-Conductor devices  
is a lengthy and complicated process. There is quite a few different steps  
involved at the --there are certain requirements for each step, and there is a  
certain protocol if you will, on verifying that certain things have been done  
properly before the work is passed on to the next step, that type of thing.

The problem had to do with improperly verifying some of these process-  
es. I don't know the specifics on that, again, this recollecting them from the  
hearing (R.40). Mr. Taylor admitted having no first hand knowledge of what  
occurred in this case (R.40) and no testimony was introduced at the hearing  
that could indicate that the conduct of the Plaintiff in mis-processing the  
material resulted in her discharge or in mis-processing any of the other  
material. It did not result in verbal or written warnings on previous occasions, was  
not willful, or wanton. The Plaintiff's conduct was not volitional  
and was not misconduct within the meaning of the statute.

B. There Is No Evidence That The Plaintiff's Discharge  
Of Her Job Was So Adverse To The Employer's Rightful Interests  
As To Justify A Preclusion Of Benefits.

The testimony of the Plaintiff at the hearing was that the result of the mis-process, in many instances, was simply loss of time and rework of product. (R.50) The Employer introduced no testimony respecting the denial of any losses incurred as a result of the Plaintiff's alleged lack of proper process. (R.45-46) When questioned on the reasons for the mis-processed lots, the Plaintiff responded that there was a great deal of pressure at the end of the day and not only was she responsible for seeing that the lots were processed properly but was also responsible for seeing that the next shift had a "good set up" when they came on. (R.52) While it can be argued that she should have simply taken more time to assure that the lots were processed properly, the resulting inefficiencies, if any, and the resulting project loss, if any, were not established by competent evidence and were not significantly adverse to the Employer's interests within the meaning of the statute.

C. The Conduct Of The Plaintiff Which Resulted In Her Discharge  
Was Not Sufficiently Culpable Within The Meaning Of The Statute.

While it is not required that the employee be found to intend to do harm to her employer, it must nevertheless be shown she intended the act such that the foreseeable harms were sufficiently serious to meet the statutory level of culpability. Clearfield City v. Department of Employment Security, 308 Pa. 114, 115 (1934); Trotta v. Department of Employment Security, 664 F. 2d 1195 (E.D. Pa. 1981). In the Clearfield City decision, the court quoted approvingly from a Maryland Court of Appeals Case, Employment Security Board v. Locates, 217 Maryland 201, 24 Cal. App. 840, (1958). The Maryland Court of Appeals stated in that case that "the important element is the nature of the misconduct and how seriously it affected the claimant's employment or the Employer's rights." Id. at 244.

there is no question that the actions of the Plaintiff complained by the Employer were directly related to her employment. There is, however, no evidence to suggest that Mrs. Martin's conduct, i.e., the mis-processing of orders on the occasion that resulted in her discharge, was a volitional act on the part of the Plaintiff with foreseeable consequences. Further, even if the consequences were foreseeable, the harm which could or would have resulted from the employer is not of such seriousness or of such a nature as to elevate the conduct from inefficiency or inability to the level of deliberate misconduct proscribed by the statute. While the Plaintiff testified that she had the ability to perform the job, (R.53) the job performance which resulted in her discharge was clearly from an inability to perform the job in the manner required. The occasions of alleged misconduct apparently occurred at times when the shift was changing, (R.52-53) and were clearly not done on the part of the Plaintiff as volitional, culpable acts, within the meaning of §35-4-5(b)(1) Utah Code Annotated.

#### POINT II.

THE BOARD OF REVIEW'S DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE.

The standard of review in unemployment compensation cases is well established.

Section 35-4-10 (1), Utah Code Annotated 1953, provides in part:

In any judicial proceeding under this section the findings of the Commission and the Board of Review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said court should be confined to questions of law.

The court is to sustain the determination of the Board of Review unless the plaintiff clearly and persuasively proves the action of the Board was arbitrary, capricious and unreasonable. Continental Oil Company v. Board of Review of Unemployment Commission, Supra. The only evidence adduced in this case which could be considered competent evidence from a witness having first hand knowledge of

the event was submitted to the appeals referee after the date of the appeal. R.33 The letter from Lerck Torgersen, General Foreman at National Shipbuilding Corporation to Mr. Rob Taylor indicates that Wayne Martin was dismissed on March 11, 1983 for violation of a written warning issued on February 11 for improper verification. It is clear from the letter that the dismissal followed by both Mrs. Martin and Mr. Torgersen as a mistake. There is no evidence as to what effect the mistake had upon the employer's interest. The appeals referee made a finding of fact that as a result of the plaintiff's mis-shipment on February 11, 1983, that the lot was scrapped and the cost to the employer was a minimum several hundred dollars. R.33 This finding is not supported by evidence. Mr. Taylor, in response to the questions by the referee explained that the loss could amount to hundreds or thousands of dollars. R.4-4. Having previously admitted that he had no first hand knowledge of the matter that resulted in Mrs. Martin's dismissal. R.40 Mr. Taylor speculated that the cost could be significant cost involved. R.40 There was no evidence presented by Mr. Taylor with respect to the precise damages that resulted to the company as a result of the mis-processed lot on February 11th, 1983. Mr. Taylor speculated hypothetically that after a point the material could not be re-used and would have to be totally scrapped and that that would be a more expensive costly mistake. R.40 and no time was any evidence received indicating what cost was as a result of Mrs. Martin's mistake.

The appeals referee draws a conclusion from its findings that the verification of the processing was a job requirement of the specialist, that the claimant's failure to perform this task "could only be attributed to carelessness and that such carelessness after repeated warnings constitutes a deliberate act for the possible adverse effect on the Employer's interest in this lot was deliberate. R.33 There is no evidence in the record, however, to support that conclusion. In fact, the record contains nothing which would indicate

...plaintiff engaged in any action in a deliberate fashion or with such neglect as to raise the conduct to that level of culpability required by §35-4-5(b)(1) of the Utah Code, as interpreted by this Court.

The reasoning and conclusion of law of the appeals referee, which was affirmed by the Board of Review, were not supported by competent evidence. The record and the decision was arbitrary, capricious, and unreasonable. Under the circumstances, this court should reverse the decision of the Board of Review which affirmed the decision of the appeals referee, and enter its judgment that the defendant's decision was not supported by substantial evidence and that the plaintiff is entitled as a matter of law to unemployment compensation benefits from March 20th, 1983.

### POINT III.

THE DECISION OF THE BOARD OF REVIEW  
IS NOT CONSISTENT WITH THE BROAD  
PURPOSES OF THE UNEMPLOYMENT COM-  
PENSATION LAW.

The declared policy of the Employment Security Act §35-4-1, et seq. Utah Code Annotated. (1953, as amended), is to establish financial reserves for the benefit of persons unemployed, through no fault of their own. Olofson Construction Co. v. Industrial Commission, 121 Utah 525, 243 F.2nd 951 (1956). Webster v. Potlatch Forest, Inc. 68 Idaho 1, 187 F.2nd 527(1947). In determining whether a claimant should be denied benefits because of "misconduct", the courts have taken the view that, because the operation of such statutes involves a penalty and a forfeiture on the employee, that such statutes are to be strictly construed. Boynton Cab Co. v. Neubeck, *Supra*.

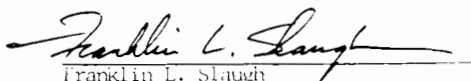
The determination of the defendant, denying benefits to the Plaintiff, is arbitrary and imposes an unjust penalty and forfeiture on an individual for the interpretation of the statute was designed to protect. The broad interpretation of the term "misconduct" that the defendant has adopted in this case is overbroad and inconsistent with the broad purpose expressed in the Employment Security Act itself.

and judicial interpretations thereof.

CONCLUSION

The carelessness, inefficiency, and ordinary negligence of the Plaintiff in failing to perform her job as a line specialist for her company was not "misconduct" within the meaning of §35-4-5(b)(1) Utah Code Annote (1953, as amended). Such conduct on the Plaintiff's part was not of such seriousness or done with the degree of culpability which would justify a conclusion of unemployment benefits. The decision of the Board of Review was contrary to law, was not supported by substantial evidence, and is inconsistent with the declared policy of the Utah Employment Security Act. The decision should be reversed and the defendant should be ordered to award Plaintiff benefits to which she was and is entitled under law.

Respectfully Submitted,



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